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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HON. JOHN F. GRADY, *et al.*
Petitioners,

v.

RHONE-POULENC RORER INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Brief in Opposition fails to refute petitioners' showing of the certworthiness of this case. Respondents present a clutter of erroneous and irrelevant arguments that warrant brief comment. The main purpose of this Reply, however, is to address the significance of respondents' refusal to defend the

central rationale of the decision of the court below. Petitioners ask this Court to review an important and controversial mandamus decision that divided the panel, that on petition for rehearing divided the entire bench of the Seventh Circuit, and that is bound to have a substantial impact on a multitude of similar cases throughout the federal system.

AVAILABILITY OF MANDAMUS

The primary question presented -- the appropriate scope of mandamus -- stems from the court of appeals' holding that mandamus is available for review of a conditional, trial court interlocutory decision, certifying a class for trial of common issues, even though that decision would be subject to review after final judgment on the issues certified for trial. The crucial aspect of the decision below holding mandamus available is its reliance on the conclusion that review after final judgment will be *ineffective* because the class certification order is sure to coerce the defendants to settle the case before final judgment. As set forth in the Petition for Certiorari, that audacious expansion of the scope of the writ flouts the teaching of this Court and conflicts with the decisions of every other court of appeals that has ruled on the issue.

In the Brief in Opposition respondents make no effort to defend the extraordinary enlargement of mandamus formulated by the court below. Respondents simply dodge the question by advancing here a spurious argument, rejected by the court below, that the class certification order would not be subject to appellate review after final judgment of the issues certified for trial.[1] Respondents' failure to address the actual decision below

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[1] The court below properly rejected this spurious argument. Pet. App. 8a.

is quite remarkable since it was the supposedly coercive effect of the class certification order that formed the centerpiece of the majority opinion.[2] That failure is itself a telling indication that certiorari should be granted.[3]

As its main argument for denial of certiorari, the Brief in Opposition offers the anarchic view that the law of mandamus is essentially without standards and that every decision is unique. Respondents find support for this strange view in the failure of this Court to issue a "catalogue of the types of orders that may be subject to mandamus." (Brief in Opp. p. 12.) If

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When trial of the class action is completed, with jury verdicts on the common issues submitted, a judgment will be entered on those verdicts. This final judgment will be appealable in the same manner as a judgment in a declaratory judgment action. If the determinations are adverse to the plaintiff class, the class will be able to appeal. If the determinations are adverse to the defendants in any respects, they will be able to appeal. A claim of error with respect to the order certifying the class for trial of common issues, if such claim exists, could be asserted in that appeal. The judgment will not lack finality because it may be of use in subsequent individual actions. Indeed the possibility of giving preclusive effect to the determinations in the class action trial is dependent upon entry of a final judgment. Thus the argument advanced in the Brief in Opposition -- that respondents may suffer the burden of litigating individual trials and that they will be unable to appeal if they prevail in those trials -- is simply beside the point.

[2] There is only one footnote in the Brief In Opposition (p. 19 n. 22) in which respondents refer, even by indirection, to the coercive-effect rationale of the decision below. Respondents' abandonment of that rationale also enabled them to avoid explaining to this Court why their assertions in corporate statements filed with the Securities and Exchange Commission conflict with the conclusions of the court below. See Pet. for Cert. p. 7 and n.10.

[3] Indeed, respondents' abandonment of the central rationale of the decision below suggests that summary reversal of the Seventh Circuit's judgment may be warranted.

every mandamus case is unique, as respondents argue, it follows that this Court should not review the criteria applied by a lower court in this or any other mandamus case.[4] Respondents purport to see no pattern in the precepts and the teachings of this Court on the proper scope of mandamus and the limited interlocutory appellate review permitted in the federal judicial system.[5] Respondents' argument that "anything goes" in determining whether to issue mandamus was rejected in *Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)*, where this Court wrote that such a stance would leave the policy against piecemeal review at the mercy of any court that chose to disregard it.

This Court has established standards for mandamus that most courts of appeals have tried to understand and follow. The decision of the court below flouts the teaching of this Court, reformulates the standards for the availability of mandamus, and conflicts with the decisions of every other court of appeals that has ruled on a similar matter.

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[4] The Brief in Opposition is strewn with assertions that this case is unique, extraordinary, case specific, limited to its facts, and indeed "factbound." See, e.g., Brief in Opp. pp. 3, 11, 13, 15, 20. Respondents' resort to this shopworn response to a certiorari petition is belied to a significant extent by the fact that there are no material facts in dispute for purposes of the present Petition for Certiorari.

Far from being "factbound," this case is "fact-loose," in the sense that the court below simply imagined a whole set of "facts" not in the record to support its coercive-effect rationale for granting mandamus and the related disparagement of the merits of plaintiffs' negligence claims.

[5] Moreover, respondents dismiss as irrelevant this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), dealing with the reviewability of orders relating to class certification, on the simplistic ground that it was not a mandamus case. See Brief in Opp. p. 13.

DISTORTION AND DISPARAGEMENT OF THE NEGLIGENCE CLAIMS

Although respondents purport to recognize that a mandamus action at an early stage of the case, and especially one to review a certification order, is not the proper place for consideration of the merits of plaintiffs' negligence claims, the Brief in Opposition presents -- in various ways and at substantial length -- respondents' views that the claims against them are legally "novel," factually complex, and generally weak. These distortions and disparagement of the claims for relief are not arguments pertinent to a petition for certiorari.

Respondents' factual assertions have no basis in the record, of course, since the negligence claims have not been tried. Discovery on the fundamental liability issue -- what did the manufacturers know, when did they know it, and what could and should they have done about it -- is currently proceeding in the district court. The skewed and self-serving account of the negligence case in the Brief in Opposition (e.g., pp. 3-5, 18-19) is immaterial and should be disregarded.

The substantive issues certified for trial by the district court involve straightforward application of widely accepted principles of the law of negligence. See Restatement (Second) of Torts § 435. The proposition that actors may be liable for harm caused by careless conduct even though the precise consequences that occurred were not foreseeable -- a proposition found in Justice Cardozo's famous *Palsgraf* decision[6] -- is hardly novel. Nor are the issues unduly complex. Moreover, respondents' contention that the special verdicts would likely contain "hundreds of interrogatories" (Brief in Opp. p. 6) is utterly without support. Indeed, it is contradicted

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[6] *Palsgraf v. Long Island R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

by the record. (See, e.g., Pet. App. 54a-60a; see also excerpt from the District Court's May 16, 1995 Status Conference, reproduced at Pet. Reply App.).

In any event, the nature and strength of the negligence claims should have been, but unfortunately were not immaterial in the reasoning of the court below. This point is made fully in the Petition for Certiorari (pp. 18-19, 26-28). Similar arguments, in a Brief in Opposition, have no place and should have no weight.[7]

MAKEWEIGHT ISSUES: *ERIE R.R.* AND THE SEVENTH AMENDMENT

The majority in the court below was persuaded to hold that mandamus was available and, having so concluded, to order decertification of the class principally on the basis of the coercion-to-settle rationale. But the majority also referred to two other matters that it labelled "concerns": (1) that trial of the certified issued could lead to future difficulty because of the *Erie R.R.* doctrine,[8] and (2) that the right to jury trial protected by the Seventh Amendment might ultimately be infringed. The majority could not -- and did not -- hold that the class certification order was a violation of either. In fact, no violation could occur unless, in a later trial, a final judgment on

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[7] As noted in the Petition for Certiorari, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), forecloses preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Respondents' failure to acknowledge the significance of *Eisen* and their misstatement on this point (Brief in Opp. p. 18) are remarkable.

[8] *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

the issue tried in the class action were given improper preclusive effect.[9]

As developed in the Petition for Certiorari, the lower court's "concerns" in this regard were mere makeweights. Nothing in the class certification order requires, or even contemplates, improper preclusive effect in later trials.[10] In later proceedings, courts will allow or limit the class action judgment to have effect only as permitted by *Erie R.R.* and the Seventh Amendment. With regard to *Erie R.R.*, the majority itself so declared explicitly.[11] With regard to the right to jury trial, this Court has made it clear that a valid Seventh Amendment claim will operate to deny preclusive effect to the judgment in an earlier trial if issues in the two trials have been improperly separated. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990).[12] Such a determination can be made only by the relevant trial court at the trial of an individual claim to verdict.

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[9] The district court envisioned that its instruction to the jury would be designed to accommodate the known differences among state laws. Pet. App. 44a-49a, 54a-60a.

[10] The trial judge spoke explicitly to this point. "It is, of course, possible that for reasons the court does not presently foresee, the verdict of the jury would not be useable for collateral purposes in a particular case or perhaps in a particular jurisdiction. But that would not detract from the efficiency of using the verdict in those cases and jurisdictions where it would be entitled to collateral effect." Pet. App. 60a.

[11] The majority below said that the judgment in the class action trial would not be given preclusive effect in a later individual trial if the judge in the later case concluded that the state law applicable to the individual trial differed from the law governing the class action trial, "and that is as it should be." Pet. App. 17a-18a.

[12] In the court below, the majority found nothing beyond "looming infringement" of Seventh Amendment rights. Pet. App. 21a.

Lytle is well discussed in Teply & Whitten, *Civil Procedure* 810-811 (1994).

That determination would be immediately appealable by the losing party on entry of final judgment.

Respondents' effort to transform the majority's "concerns" for future events into flat holdings of consummated violation of the Constitution is quite simply a misstatement of the reasoning of the court below.

And, even as mere "concerns," these issues lack substance for purposes of this mandamus case.[13] The only possible present question is whether there is sufficient similarity between the laws of the jurisdictions involved in the proposed class action trial and in subsequent individual trials to make it worthwhile to proceed with a class action trial. The legal bases for plaintiffs' negligence claims are within the mainstream of tort law prevailing across the United States as reflected in the Restatement (Second) of Torts. The possibility that difficulties may arise under *Erie R.R.* or the Seventh Amendment in some later individual trials is extremely remote.[14] Indeed, what

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[13] Respondents continue to assert that the class certification order is subject to mandamus review under *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). Those cases involved *denials* of demands for jury trial on issues triable by jury. In this case, every issue triable by jury will be tried to a jury in the proposed class action trial.

Moreover, the "concern" in this case is the bifurcation of issues to be tried, perhaps, before two juries. The Seventh Amendment does not *per se* preclude bifurcated trials. Bifurcation was not an issue in either *Beacon Theatres* or *Dairy Queen*.

The Court in *Beacon Theatres* assumed that a determination made by a judge would be preclusive in a subsequent stage of the proceeding before a jury -- an assumption that (whatever its validity in *Beacon Theatres*) is plainly inapplicable here. See note 12, *supra*, and accompanying test.

[14] Respondents argue that trial of their negligence in the class action trial should not be bifurcated from trial of issues of proximate cause and of comparative negligence that may arise. It is extremely unlikely that such

respondents urge is simply that, because there may turn out to be logistic considerations relating to a factual variant in an individual case or to an isolated issue of state law, it is better to do nothing than to permit a class trial of common issues, even though substantial net benefit would accrue from resolution of the common issues.

In any event, disagreement about the chance of encountering such difficulties in the future is precisely the kind of issue that should not be presented for premature resolution in a mandamus proceeding.

CONCLUSION

The decision of the court below has already had, and continues to have major effect on mass tort litigation proceedings in federal courts across the country. As a result of that decision, certification in district courts will inevitably be colored by the likelihood of mandamus petitions if certification orders are issued. Indeed, the Seventh Circuit decision has been relied upon already by counsel in a significant number of cases.[15]

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issues would be presented at all, much less presented in a form that could not be accommodated within the requirements of the Seventh Amendment as to bifurcation. In the unlikely event that the requirements of the Seventh Amendment could not be met, the only consequence would be to deny preclusive effect to the judgment in the class action trial. *Lytle v. Household Mfg., Inc., supra.*

[15] The Petition for Certiorari noted that the decision of the court below was promptly relied upon by defense counsel in the Albuterol case, first seeking decertification of a class in the trial court and thereafter in a mandamus proceeding in the Tenth Circuit. Both opinions were reproduced in the Appendix to the Petition. *In re Copley Pharmaceutical, Inc.*, MDL Docket No. 1013 (D. Wyoming, April 25, 1995) and *Copley Pharmaceutical v. Brimmer*, No. 95-8032 (CA 10, May 31, 1995). (Pet.

This major cloud over the ongoing efforts of federal courts to deal with complex litigation should be removed. The Petition for Certiorari should be granted.

App. 169a, 171a).

The decision of the court below has also been relied upon in presentations to other courts of appeals. In the penile prosthesis case, defense counsel, seeking mandamus to overturn a class certification order, relied extensively upon the decision. *In re Medical Systems, Inc.*, No. 95-3303 (CA6) (Supplemental Brief in Support of Petition for Writ of Mandamus, March 21, 1995, pp. 10-13; Reply Brief, May 1, 1995, pp. 1-7, 9-10, 17-18, 20, 24). In the tobacco case, defense counsel relied upon the decision in a petition to the Fifth Circuit for permission to take an interlocutory appeal from a district court order certifying a nationwide class. *Castano v. The American Tobacco Co.*, No. 95-00117 (CA5 1995) (Petition for Permission to Appeal, May 25, 1995, pp. 8, 12, 15, 19, 20). Permission to appeal has been granted by the Fifth Circuit by Order entered July 26, 1995. And in the Felbatol litigation, *Valentino v. Carter-Wallace, Inc.*, No. 95-80161 (CA9 1995), defense counsel relied upon the decision repeatedly in seeking interlocutory review of the class certification order (Petition for Permission to Appeal, April 15, 1995, pp. 5, 12, 14, 17-20, 22, 24, 26; Permission to appeal has been granted in the Ninth Circuit by Order entered May 22, 1995) (See Brief on the Merits for Defendants/Appellants Sept. 7, 1995 at pp. 16, 17, 18, 23, 24, 28, 30, 32).

The decision of the court below has been used in argument at the district court level. See, e.g., *Mock v. Baxter Healthcare Corp.*, (Hepatitis C virus case), No. CV 94-0524-S-LMB (D. Idaho) (Defendants' Brief in Opposition to Motion for Class Certification, March 31, 1995); *Anderson v. American Home Products Corp.* (Norplant contraceptive case), MDL Docket No. 1038 (E.D. Texas) (Memorandum in Opposition to Plaintiffs' Motion for Class Certification, June 5, 1995; Surreply Memorandum in Opposition to Plaintiffs' Motion for Class Certification, July 31, 1995).

A copy of those portions of the documents referred to in this footnote has been lodged with the clerk and served upon counsel for respondents.

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